D.C. Criminal Code Reform Commission
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MINUTES OF PUBLIC MEETING

WEDNESDAY, FEBRUARY 6, 2019, at 10:00 AM
CITYWIDE CONFERENCE CENTER, 11th FLOOR OF 441 4th STREET NW
WASHINGTON, D.C. 20001

On Wednesday, February 6, 2019, at 10:00 am, the D.C. Criminal Code Reform Commission (CCRC) held a meeting of its Criminal Code Reform Advisory Group (Advisory Group). The meeting was held in Room 1112 at 441 Fourth St., N.W., Washington, D.C. The meeting minutes are below. For further information, contact Richard Schmechel, Executive Director, at (202) 442-8715 or richard.schmechel@dc.gov.

Commission Staff in Attendance:

Richard Schmechel (Executive Director)

Michael Serota (Sr. Attorney Advisor)

Rachel Redfern (Sr. Attorney Advisor)

Jinwoo Park (Attorney Advisor)

Patrice Sulton (Attorney Advisor)

Blake Allen (Law Student Intern)

Advisory Group Members and Guests in Attendance:

Laura Hankins (Designee of the Director of the Public Defender Service for the District of Columbia)

Katarina Semyonova (Visiting Attendee of the Public Defender Service for the District of Columbia)

Kenya Davis (Visiting Attendee of the United States Attorney for the District of Columbia)

Renata Kendrick Cooper (Designee of the United States Attorney for the District of Columbia)

Sharon Marcus-Kurn (Visiting Attendee of the United States Attorney for the District of Columbia)

Elana Suttenberg (Visiting Attendee of the United States Attorney for the District of Columbia)

Dave Rosenthal (Representative of the D.C. Attorney General)

Don Braman (Council appointee)

Paul Butler (Council appointee) (by phone)

I. Welcome and Announcements

a. The Executive Director noted that the next round of written comments are due March 1, 2019. The next Advisory Group meeting will be held March 6, 2019.

b. The Executive Director noted that a compilation of updated draft reports is forthcoming in March of 2019. It will include statutory language, redlined statutory language (showing changes from prior drafts), and a document that addresses each of the advisory group written comments. The Advisory Group will have approximately eight weeks for review of the updated reports.

II. The Advisory Group discussed the First Draft of Report No. 26: Sexual Assault and Related Provisions.

a. USAO inquired as to what informed the agency's decision to partially narrow the current definition of "sexual act," from the current "intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire" to "intent to sexually degrade, arouse, or gratify."

   i. USAO noted that, as drafted, the government may now be required to offer for certain sexual acts evidence that the defendant was in fact motivated by sexual gratification or arousal. USAO said this may be difficult to prove in some cases, for example, where the victim was unable to see the attacker and in cases where the perpetrator was physically unable to become aroused. USAO said that some sexual acts do not aim to gratify and are instead acts of violence and harassment. USAO posited that where the contact is penetration or oral sex, liability should attach without needing to prove a sexual intent. It also provided as an example a case of a serial offender who grabbed women's buttocks for the purpose of embarrassing them.

   ii. Agency staff explained that other revised offenses—such as Assault and Offensive Physical Contract—provide liability for violence that is not sexual in nature. Agency staff stated that, given the higher penalties and sex offender registration requirements that accompany sexual offense convictions, it is appropriate to limit the sexual offenses to conduct that is sexual in nature. Agency staff also clarified that culpable mental state of "intent" does not require evidence of "purposeful" conduct.

   iii. PDS distinguished between sexually degrading and arousing and explained that the government would be able to prove degradation in the cases where it cannot prove an intent to gratify.

b. USAO asked whether the commission intends to draft conforming amendments to the sex offender registration requirements, which align with the offense elements in current law.

   i. Agency staff responded that, after the offense definitions are completed, a conforming amendment may be necessary to sex offense registration requirements and various other provisions in statutes not directly revised, but affected by, Commission work. Agency staff also explained that the definitions in the revised code will not apply to statutes that are not revised, absent a conforming amendment.

c. USAO asked why the commission added "intent to sexually degrade, arouse, or gratify" to oral sexual acts in subsection (B) of the revised definition of "sexual act" when such an intent requirement is absent in the current definition.
d. Agency staff stated that the intent requirement is consistent with the other subsection of the revised definition of "sexual act" and with the revised definition of "sexual contact." In addition, requiring the same intent in all subsections of the revised definition of "sexual act" as is required in revised the definition of "sexual contact" clarifies that offenses requiring "sexual contact" are lesser included offenses of offenses that require a "sexual act." Under current District case law, this lesser included offense issue is unresolved.
e. USAO stated that in practice it generally does not argue against offense that require "sexual contact" from being considered lesser included offense of offenses that require a "sexual act." PDS and USAO discussed the particulars of this practice.
f. Professor Butler and agency staff explained the importance of codifying best practices, instead of relying on the discretion of one prosecutor's office at a particular moment in time.
g. PDS asked for clarification of OAG's written comments on RCC § 22E-1303 concerning the intersection between voluntary intoxication and willful blindness. That comment offers a hypothetical in which a person who decides to rape deliberately consumes alcohol to "get up the nerve" to rape, commits a rape, and then argues that at the time of the rape he lacked the requisite mental state (knowledge).
    i. Agency staff explained that liability for this actor would exist under the RCC general provisions either: (1) directly, because the voluntary intoxication would not, in fact, negate the culpable mental state of knowledge; or (2) indirectly, by imputing recklessness pursuant to the RCC general intoxication provision and thereafter imputing knowledge pursuant to the RCC general provision on deliberate ignorance. Staff explained that it is also possible that the requisite knowledge could be understood to exist by application of a broader time frame which reaches the actor's initial decision to drink. Staff also noted that forthcoming revisions to the general part commentary will address this issue.
    ii. Professor Butler said that the imputation of knowledge may not be as simple or uncontroversial as suggested. One might argue that a person who does not have the requisite culpable mental state should be found not guilty, irrespective of the reason that the mental state was not formed.
h. USAO inquired as to what informed the agency's decision to limit penalty enhancements to the revised sexual assault offense only. It noted that the enhancements under current law help capture the seriousness of some other offenses, such as sexual abuse of a minor by a person who shares a significant relationship with the child. USAO offered as an example, father-daughter rape cases that do not involve force.
    i. Agency staff explained that, in some instances, the enhancements cannot apply because they are duplicative of the elements of the offenses. For example, a significant relationship is already an element of First Degree Sexual Abuse of a Minor.

ii. Agency staff also explained that the Commission is generally reviewing the use and effect of the District's penalty enhancements. The Commission's initial review suggests that penalty enhancements for matters other than weapon possession and the victim's minority status are rarely used, and, for all types of penalty enhancements, the higher statutory maximum applicable because of the enhancement is not used. The Executive Director noted that sexual offenses, in particular, appear to have numerous possible enhancements that, in some instances, reflect conflicting policy choices that agency hopes to clarify and make consistent with other offenses. Staff noted that the agency's penalty recommendations are still forthcoming and may adequately address concerns about the severity of punishment. The Commission invited additional data and examples of aggravating circumstances.

III. The Advisory Group discussed the First Draft of Report No. 27: Human Trafficking and Related Statutes.

a. USAO inquired as to what informed the agency's decision to remove fraud from the list of *per se* forms of coercion. USAO said that the provision is helpful for forced labor cases and offered a hypothetical in which a person is told they will be paid, performs the work request, and then, instead of receiving payment, they are threatened with deportation.
    i. Agency staff responded that when fraud is used in conjunction with other coercive conduct, the trafficking offenses may still apply. However, in cases where *only* fraud was used, that the conduct is more appropriately criminalized as property crime—such as fraud and fraudulent theft of services—instead of as human trafficking. Agency staff also noted that the catchall provision can be used to capture unenumerated forms of coercion.
    ii. PDS distinguished between theft of labor and trafficking, based on the victim's ability to stop working or leave. Where a person is deceived into performing labor, but not coerced to perform additional labor, fraud or theft of services account for the harm inflicted. Trafficking offenses are only appropriate when a person is coerced into performing labor against his will.
b. USAO inquired about liability for coercion that is achieved by making an implicit threat.
    i. Agency staff clarified that explicit and implicit threats may amount to coercion.
c. USAO asked for clarification of the term "harm."
    i. Agency staff responded that, although "harm" is not a defined term, it is not limited to physical injuries, and is intended to broadly include adverse effects such as financial or reputational damage.
    ii. The Advisory Group discussed replacing the word "harm" with the words "adverse circumstances," or "adverse outcomes," which could help clarify that physical injuries are not required.

IV. The Advisory Group discussed the First Draft of Report No. 28: Stalking.

a. USAO asked for clarification of the term "combination."

i. Agency staff agreed that the term should be stricken to make the offense definition clearer.

b. USAO recommended amending the unwelcome communication provision to include a notice to cease that is conveyed by someone other than the complainant, on the complainant's behalf.
    i. Agency staff said that the phrase "directly or indirectly" and the corresponding commentary criminalize communications that follow a notice to cease that is conveyed by a third party.

c. OAG asked to clarify a footnote in the commentary about third party notice. Specifically, OAG asked whether the third party must state that it is the complainant who wants the communication to stop.
    i. Agency staff clarified that the third party need not state that the complainant wants the communication to stop, however, the defendant must know that the complainant wants the communication to stop.

d. USAO inquired as to what informed the agency's decision to include a notice requirement, in light of the requirement that the defendant act purposely. It offered a hypothetical in which it should be obvious to the defendant that the contact is unwelcome because the complainant runs away or begins to cry.
    i. Agency staff clarified that the notice requirement applies only to unwelcome communications. Accordingly, a complainant need not inform a defendant that conduct such as following, threatening, or committing property crime is unwelcome. However, a defendant is not required to infer that no further communication is welcome based on something other than notice to cease, such as running away or crying.

e. OAG asked about whether the definition of "physically following" will be codified, per PDS' written comments.
    i. Agency staff indicated that the suggestion to codify the definition of "physically following" that appears in the draft commentary will be considered before the next draft.
    ii. OAG requested a more precise explanation of "close proximity."
    iii. Agency staff explained that "close proximity" is intended to mean something similar to "immediate vicinity" in the revised rioting statute. The defendant must be near enough to see or hear the complainant's activities but need not be near enough to touch the complainant.

V. The Advisory Group did not have additional comments or questions on the First Drafts of Reports No. 29-33.

VI. The Advisory Group discussed the Second Draft of Report No. 9: Recommendations for Theft and Damage to Property Offense.

a. The Executive Director clarified that the second draft of Report #9 does not incorporate all previous advisory group comments on the first draft. Rather, the second draft adds a provision for theft from a person, which is punished as robbery under current law.

VII. Adjournment.

a. The meeting was adjourned at 11:50am.